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No. 82-24

In the Supreme Court of the United States

OCTOBER TERM, 1981

FEDERAL TRADE COMMISSION, PETITIONER

v.

FRANCIS FORD, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether an order of the Federal Trade Commission in an adjudicatory proceeding is unlawful because the agency failed to proceed by rulemaking rather than adjudication when articulating new legal standards of general application.*

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*The parties in the court of appeals were the Federal Trade Commission and Francis Ford, Inc.

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v.

FRANCIS FORD, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-5a) is reported at 673 F.2d 1008. The opinion and order of the Federal Trade Commission (Apps. D and E, *infra*, 13a-73a) and the initial decision of the administrative law judge (App. F, *infra*, 74a-139a) are reported at 94 F.T.C. 564.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 6a) was entered on August 24, 1981. A petition for rehearing was denied on April 5, 1982 (App. C, *infra*, 7a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent portions of Sections 5 and 19 of the Federal Trade Commission Act, 15 U.S.C. 45 and 57b, are set forth in Appendix G, *infra*, 139a-143a.

STATEMENT

1. The Federal Trade Commission ("Commission") is responsible for enforcing Section 5 of the Federal Trade Commission Act, 15 U.S.C. (& Supp. IV) 45, which prohibits, *inter alia*, "unfair or deceptive acts or practices in or affecting commerce." Whenever the Commission has reason to believe that any person, partnership, or corporation has been or is using any unfair or deceptive act or practice, the Commission is authorized to issue an administrative complaint instituting an adjudicatory proceeding. If the respondent denies the allegations in the complaint, the case is tried before an administrative law judge (5 U.S.C. (& Supp. IV) 554). The administrative law judge's initial decision is reviewable by the full Commission (5 U.S.C. (& Supp. IV) 554 and 557). If the Commission finds, on the administrative record, that unfair or deceptive practices have been committed, it may enter a prospective order requiring the respondent to cease and desist from the unlawful practice.[1] Such an order is subject to judicial review in the court of appeals (15 U.S.C. 45(c)).

After entering a final cease and desist order, the Commission also is empowered under Section 19(a)(2) of the Act, 15 U.S.C. 57b(a)(2), to sue the respondent in district court seeking restitution, redress, or other relief for the benefit of injured consumers. To obtain such retrospective relief, the Commission must establish both that the challenged practices were unfair or deceptive and that a reasonable man would have known that they were fraudulent or dishonest (15 U.S.C. 57b(a)(2)).

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[1] See *FTC* v. *Standard Oil Co. of Cal.*, 449 U.S. 232, 241-242 (1980).

In addition to its authority to establish unfair or deceptive acts or practices through adjudication, the Commission is authorized to promulgate rules defining such acts or practices (15 U.S.C. (& Supp. IV) 57a). When the Commission proceeds by rulemaking, however, it may seek consumer redress only for acts or practices that occurred after issuance of the rule (15 U.S.C. 57b(a)(1)). To obtain such relief, the Commission need only prove that the rule was violated (15 U.S.C. 57b(a)(2)).

2. In 1976, the Commission initiated unfair practice proceedings under Section 5 against three automobile manufacturers (General Motors, Ford, and Chrysler), their financing subsidiaries, and three automobile dealers, including respondent Francis Ford, Inc., the second largest Ford dealer in Portland, Oregon. The complaints alleged,[2] *inter alia*, that the companies had systematically failed to pay credit customers whose automobiles had been repossessed the surpluses earned on resale of their cars. That practice, the complaints charged, violated Section 9-504 of the U.C.C. (Cum. Supp. 1974), which has been enacted by 49 states, including Oregon (Or. Rev. Stat. § 79.5040(1973)) (App. D, *infra*, 15a). Section 9-504 requires that when property subject to a security interest is repossessed upon default, the secured party must "dispose" of it in a "commercially reasonable manner" (U.C.C. § 9-504(3)) and must "account" to the debtor for any balance remaining after the indebtedness and certain "reasonable expenses" of the secured party are deducted from the "proceeds" obtained upon disposition (U.C.C. § 9-504(1), (2)). The complaints alleged that breach of the duty to repay surpluses was not only an "unfair practice" but also a practice likely to justify redress for previously injured consumers (see App. D, *infra*, 31a-32a & n.13).

Eight firms eventually entered settlements under which they agreed both to desist from the challenge practices and to

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[2] See *Ford Motor Co.*, 93 F.T.C. 402-406 (1979); *General Motors Corp.*, 95 F.T.C. 825-830 (1980); *Chrysler Corp.*, 97 F.T.C. 107 (1981).

repay more than $2.5 million in surpluses that had been withheld from consumers.[3]

Francis Ford contested the complaint against it, and a two-week trial was held. In sworn testimony, Francis Ford officials offered several contradictory descriptions of their repossession practices (App. D, *infra*, 17a-20a), but the Commission assumed *arguendo* that the firm had actually followed the least objectionable method (*id.* at 20a). According to that method, when Francis Ford received a repossessed car, it would make its own private estimate of the car's wholesale value and would treat that estimate as the "proceeds" obtained upon disposition *(ibid.)*. Since the dealer's estimate was invariably less than or precisely equal to the amount still owed by the debtor, Francis Ford considered that it was not obligated to pay any surplus *(ibid.)*. However, when Francis Ford actually resold repossessed automobiles, the proceeds obtained exceeded the amount still owed by the debtor plus Francis Ford's reasonable expenses for 43 of approximately 180 cars resold during 1974 and 1975 (App. D, *infra*, 17a; App. F, *infra*, 88a, 102a, 108a).[4]

The administrative law judge concluded that Francis Ford had committed an unfair practice by systematically failing to pay surpluses as required by the U.C.C. (App. F, *infra*, 108a-115a), and the Commission sustained that determination on

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[3] See *Ford Motor Co.*, 93 F.T.C. 402, 406-421 (1979); *General Motors Corp.*, 95 F.T.C. 825, 831-853 (1980); *Chuck Olson Chevrolet*, 96 F.T.C. 37 (1980); *Chrysler Corp.*, 97 F.T.C. 107, 139 (1981). Certain prohibitory portions of these orders are subject to "most favored corporation clauses."

[4] Francis Ford did repay a handfull of those 43 surpluses after receiving a letter from the FTC staff questioning its repossession practices and after receiving advice from counsel that it should do so (App. D, *infra*, 18a n.5; App. F, *infra*, 94a). Francis Ford thereafter retained new counsel and resumed its prior practice of neither paying such surpluses nor notifying customers of their existence (App. F, *infra*, 94a-95a).

appeal (App. D, *infra*, 27a-29a). Citing extensive case law under the U.C.C., the Commission held that a dealer holding a security interest in a repossessed car may not discharge its duty to dispose of collateral in a "commercially reasonable" manner (U.C.C. § 9-504(3)) merely by making a private estimate of the value of the collateral (App. D, *infra*, 20a-21a). The Commission concluded that an actual disposition of the collateral is required (*ibid.*). Turning to the only disposition of repossessed vehicles made by Francis Ford—sales at retail—the Commission rejected Francis Ford's contention that the provision of U.C.C. § 9-504(1)(a) permitting the secured party to recoup "the reasonable expenses of retaking, holding, preparing for sale or lease, selling and the like" allowed a deduction for general firm overhead or for a second profit on resale (App. D, *infra*, 22a-26a). In any event, the Commission noted, Francis Ford had not even attempted such calculations except in isolated instances after receipt of a letter from the FTC staff questioning its prior practice (*id.* at 18a n.5, 22a n.8). See page 4, note 4, *supra*.

The Commission entered an order virtually identical to the consent agreements reached earlier with the other parties. Under that order, Francis Ford was prohibited from continuing to withhold surpluses from its customers in the future (App. E, *infra*, 62a-64a). The Commission's opinion also stated that the case might warrant a suit for consumer redress on behalf of individuals from whom surpluses had been wrongfully withheld, but the Commission stated that it would reserve final decision on that question (App. D, *infra*, 36a).

3. On petition for review, the court of appeals vacated the Commission's order (App. B, *infra*, 6a), stating that "[t]he narrow issue presented here is whether the F.T.C. should have proceeded by rulemaking in this case, rather than by adjudication" (App. A, *infra*, 2a). The court held that (*id.* at 3a) "an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application." The court stated that the Commission's construction of U.C.C. § 9-504 was unprecedented (App. A, *infra*, 4a), that there had

been no prior notice of the Commission's interpretation *(ibid.)*, and that the Commission could have formulated its position in a proposed trade rule on credit practices *(ibid.)*.[5] The court concluded (*id.* at 5a):

> Ultimately, however, we are persuaded to set aside [the Commission's] order because the rule of the case made below will have general application. It will not apply just to Francis Ford. * * *
>
> Under these circumstances, the F.T.C. has exceeded its authority by proceeding to create new law by adjudication rather than by rulemaking.

The Commission filed a petition for rehearing and a suggestion for rehearing en banc. Amicus curiae briefs in support of the Commission's position were filed by the United States, the Civil Aeronautics Board, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Energy Regulatory Commission, the Federal Maritime Commission, the Interstate Commerce Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, and the Securities and Exchange Commission. Rehearing was denied (App. C, *infra*, 7a).[6] Dissenting from the denial of rehearing, Judge Reinhardt observed that the panel's decision conflicts "with the general principles of administrative law, previously enunciated by the Supreme Court" (*id.* at 8a). He added (*id.* at

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[5] The Commission's "Notice of Proposed Rulemaking" appears at 40 Fed. Reg. 16347 (1975). The proposed rule (which has not as yet been adopted or rejected by the Commission) would, *inter alia*, require creditors to credit a debtor with the fair market retail value of repossessed collateral for purposes of calculating any deficiency judgment. However, nothing in the proposed rule would require a creditor to refund a surplus withheld in violation of existing state law, which is the subject of this case.

[6] In accordance with Ninth Circuit practice, the number of judges voting for rehearing was not revealed (see App. C, *infra*, 10a-11a n.1).

8a-9a): "Unless the Supreme Court grants certiorari, and applies a different standard than we appear to be adopting, government agencies will be required to ask us on a case by case basis to limit, narrow, and explain away the overly broad rationale set forth in the opinion."

REASONS FOR GRANTING THE PETITION

Thirty-five years ago in *SEC* v. *Chenery Corp.*, 332 U.S. 194, 200-203 (1947) *(Chenery II)*, this Court rejected the argument that a federal administrative agency must employ rulemaking rather than adjudication when articulating new legal standards. The Court stated (*id.* at 203): "There is * * * a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." In succeeding years, this Court has reiterated that cardinal rule of administrative law. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 290-295 (1974); *NLRB* v. *Wyman-Gordon*, 394 U.S. 759, 765-766, 772 (1969). In this case, however, the court of appeals held (App. A, *infra*, 3a; emphasis added) that "an agency *must* proceed by rulemaking if it seeks to change the law and establish rules of widespread application." The decision below is thus squarely contrary to this Court's established precedents and merits summary reversal. As Judge Reinhardt aptly put it in dissenting from the denial of rehearing en banc (App. C, *infra*, 10a): "The panel's opinion pays lip service at most to the basic principle that 'the choice between rulemaking and adjudication lies in the first instance within the Board's discretion.' * * * While repeating the rule, the panel opinion gives it no weight and no significance * * *."

Not only is the court of appeals' decision in direct conflict with this Court's decisions, but it is devoid of any authoritative support and is inconsistent with provisions of the Federal Trade Commission Act, 15 U.S.C. (& Supp. IV) 41 *et seq.* That Act plainly contemplates that the Commission may employ adjudicatory proceedings, as it did here, to define "unfair or

deceptive acts or practices" (see 15 U.S.C. (& Supp. IV) 45(b)) and that such adjudications may result in new interpretations of the law that bind non-parties (see 15 U.S.C. 45(m)(1)(B)).

Moreover, the principle upon which the court of appeals' decision rests is totally unworkable. A large number of adjudications, whether judicial or administrative, "change the law" in a significant way. And many agency adjudications, which typically involve the interpretation of broadly worded statutes of nationwide scope, have "widespread application" under familiar principles of stare decisis. Therefore, the decision below, if allowed to stand, will cast doubt upon the legality of a large number of administrative adjudications and will spawn numerous petitions for review invoking the essentially standardless rule upon which the court of appeals' decision in this case rests.[7]

Finally, the decision below cannot be supported on the ground that the use of adjudication in this case constituted an abuse of the Commission's discretion. The court did not find an abuse of discretion, and there is no support in the record for such a finding.

1. The decision of the court of appeals is squarely inconsistent with this Court's prior precendents. Without identifying any statutory provision preventing the Commission from employing adjudication to define unfair acts or

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[7] The general counsels of the Civil Aeronautics Board, Commodity Futures Trading Commission, Consumer Product Safety Commission, Federal Communications Commission, Federal Energy Regulatory Commission, Interstate Commerce Commission, National Labor Relations Board, Nuclear Regulatory Commission, and Securities and Exchange Commission have written to the Solicitor General to express their concern about the harmful implications of the court of appeals' decision in this case. This petition also serves as a brief amicus curiae on behalf of these agencies urging review of that decision.

practices [8], and without passing upon the merits of the Commission's decision, the court of appeals vacated the Commission's order because, in the court's view (App. A, *infra*, 5a), "the F.T.C. * * * exceeded its authority by proceeding to create new law by adjudication rather than by rulemaking." However, this Court's decisions in *Chenery II*, *Wyman-Gordon*, and *Bell Aerospace* leave no doubt that federal administrative agencies are "not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion" (*NLRB* v. *Bell Aerospace Co.*, *supra*, 416 U.S. at 294).

a. Chenery II, although not decided under the Administrative Procedure Act, 5 U.S.C. (& Supp. IV) 551 *et seq.*, is not only analogous to the present case, [9] but dispositive. *Chenery II* involved review of an order of the Securities Exchange Commission entered after the remand in *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943) (*Chenery I*). In *Chenery I*, the Court set aside an SEC order refusing to approve a holding company's reorganization plan because the firm's officers and directors had traded in the company's securities during the reorganization period. The SEC had relied solely on prior judicial precedents, but this Court found that prior judicial decisions did not establish any principle of law or equity forbidding officers and directors of firms in reorganization from trading in their firm's stock (*id.* at 89-90). On remand, the

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[8] The Federal Trade Commission Act contemplates that the Commission will usually define unfair trade practices through adjudication (see pages 12-13, *infra*).

The Administrative Procedure Act, which defines the terms "rule" and "adjudication," 5 U.S.C. 551(4), (6), (7), and specifies appropriate procedures for both types of agency action (5 U.S.C. (& Supp. IV) 553, 554, 556 and 557), does not compel the use of either. See *NLRB* v. *Wyman-Gordon Co.*, *supra*, 394 U.S. at 771-772 (Black, J., concurring).

[9] See *NLRB* v. *Bell Aerospace Co.*, *supra*, 416 U.S. at 292 n.23.

SEC again reached the same result, but instead of supporting it by earlier judicial decisions, the agency relied upon a new administrative interpretation of the requirement in the Public Utility Holding Company Act that reorganization plans be "fair and equitable" (*Chenery II*, *supra*, 332 U.S. at 204). On review of this second order, the respondent corporation asserted—as did the court of appeals in this case (App. A, *infra*, 3a-5a)—that in the absence of prior judicial precedent the Commission could not in an adjudicatory proceeding determine for the first time that the challenged conduct was unfair and inequitable (see 332 U.S. at 199-200). Instead, the company maintained (*ibid.*), the agency was required to proceed by prospective rulemaking. This Court rejected that contention, holding that "[t]here is * * * a very definite place for the case-by-case evolution of statutory standards" and that the "choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency" (332 U.S. at 203).

b. NLRB v. *Wyman-Gordon Co.*, *supra*, reinforces this rule. There, the National Labor Relations Board directed an employer to furnish a list of its employees' names and addresses to two unions seeking to be chosen as the employees' bargaining representative (see 394 U.S. at 761). In issuing that order, the Board relied upon its prior decision in *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966), in which it had established a general requirement that such a list must be provided in future cases but declined to apply that requirement to the case before it.

The court of appeals held that the Board's order was invalid because it was based on a rule laid down in the *Excelsior* adjudication rather than in accordance with the rulemaking provisions of the Administrative Procedure Act. This Court reversed. In the plurality opinion joined by Chief Justice Warren and by Justices Stewart and White, Justice Fortas criticized the Board's use of adjudicatory proceedings to announce a rule of solely prospective application (394 U.S. at 765-766).

He stated:

> There is no question that, in an adjudicatory hearing, the Board could validly decide the issue whether the employer must furnish a list of employees to the union. But that is not what the Board did in *Excelsior*. The Board did not even apply the rule it made to the parties in the adjudicatory proceeding, the only entities that could properly be subject to the order in that case.

However, the plurality took pains to make clear that there is no impediment to agency adjudications that establish new precedent applicable to the parties in the case at hand (394 U.S. at 765-766; emphasis added):

> Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. * * * They generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of *stare decisis* in the administrative process they may serve as precedents.

Thus, although the plurality believed that the *Excelsior* rule had been improperly adopted, it recognized that the same principle of law had been properly adopted in the adjudicatory proceeding then under review, because the decision in that proceeding bound the parties (*id.* at 766).

Concurring in the result, Justice Black, joined by Justices Brennan and Marshall, saw no defect in the procedure employed by the Board in the *Excelsior* case (394 U.S. at 770-775). Justice Black wrote (*id.* at 772):

> Our decision in *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), though it did not involve the Labor Board or the Administrative Procedure Act, is nonetheless equally applicable here. As we explained in that case, "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Id.*, at 203.

In the present case, the Commission's decision applied to Francis Ford, the only remaining party to the adjudication. Thus, that decision was entirely proper under both the plurality and concurring opinions in *Wyman-Gordon*.

c. This Court reconfirmed *Chenery II* and *Wyman-Gordon* in *Bell Aerospace Co.* At issue in that case was whether certain buyers were covered by the National Labor Relations Act. This Court agreed with the court of appeals that all employees properly classified as "managerial" were excluded from the Act's coverage (416 U.S. at 274-290). However, the Court unanimously rejected the lower court's holding that the Board was required to employ rulemaking rather than adjudication if on remand it wished to overrule its prior decisions holding that buyers are managerial employees (*id.* at 290-295 (majority and dissenting opinions)). The Court stated (*id.* at 294):

> The views expressed in *Chenery II* and *Wyman Gordon* make plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion.

The court of appeals' decision in this case—holding (App. A, *infra*, 3a) that "an agency *must* proceed by rulemaking if it seeks to change the law and establish rules of widespread application"—flies in the face of the unanimous views of this Court expressed in *Bell Aerospace*.

2. The court of appeals' decision also is inconsistent with the intent of Congress as manifested in the Federal Trade Commission Act, 15 U.S.C. (& Supp. IV) 41 *et seq.* Like the Labor Act in *Wyman-Gordon* and *Bell Aerospace* (see 416 U.S. at 291 n.21), the Federal Trade Commission Act does not specify that the agency must use rulemaking instead of adjudication to determine when practices violate statutory standards. On the contrary, Section 5(b) of the Act, 15 U.S.C. (& Supp. IV) 45(b), contemplates that the Commission will normally proceed by adjudication in determining what constitutes an "unfair or deceptive act or practice[]." Section 5(b) provides that "[w]henever the Commission shall have reason

to believe that any * * * corporation * * * is using any * * * unfair or deceptive act or practice [in respect to which a proceeding would be in the public interest], it shall issue and serve * * * a complaint stating its charges in that respect * * *." In granting this power, Congress intended that the Federal Trade Commission, the expert body in this field, would employ adjudicatory proceedings to develop a coherent and uniform body of precedent identifying unfair and deceptive trade practices and establishing appropriate remedies to be enforced by cease and desist orders. This task was to be conducted subject to review by the courts, which would have the ultimate responsibility for determining whether a practice was unlawful. See, *e.g.*, *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 249 (1972); *FTC* v. *R.F. Keppel & Bros.*, 291 U.S. 304, 314 (1934). Although the Act also gave the Commission authority "to make rules and regulations for the purpose of carrying out [its] provisions" (15 U.S.C. 46(g)), the Commission's authority to define unfair acts or practices by rule was not confirmed until 1973. *National Petroleum Refiners Association* v. *FTC*, 482 F.2d 672 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974). A 1975 amendment to the FTC Act expressly conferred upon the Commission the authority to adopt rules defining unfair or deceptive acts or practices (15 U.S.C. (& Supp. IV 57a), but there is nothing to suggest that that amendment was intended to diminish the Commission's traditional discretion to proceed by adjudication in appropriate cases.

Indeed, another provision of the 1975 amendments is completely inconsistent with the court of appeals' holding (App. A, *infra*, 3a) that the Commission "must proceed by rulemaking if it seeks to change the law and establish rules of widespread application." 15 U.S.C. 45(m)(1)(B) provides that when the Commission enters an order adjudicating a particular practice to be unfair or deceptive, it may obtain civil penalties from businesses not parties to the original adjudication if they later commit the same unfair or deceptive practices with actual

knowledge of the Commission's holding.[10] Thus, the orders to which this provision applies are orders entered in adjudicatory proceedings, which generally define new unfair or deceptive practices, and which may be binding upon businesses that are not parties to the adjudication. By enacting this provision, Congress plainly rejected the rationale of the court of appeals in the present case.

In accordance with the clear intent of the Federal Trade Commission Act, this Court has stated that the Commission may hold in an adjudication that a "practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes" (*FTC* v. *Sperry & Hutchinson Co.*, *supra*, 405 U.S. at 244 n.5). Here, the Commission properly found that Francis Ford's practices offended public policy as established by the Uniform Commercial Code and numerous cases thereunder. Moreover, as *Sperry & Hutchinson Co.* makes clear, the lack of prior judicial decisions holding such practices unlawful would not prevent the Commission from acting.

3. Not only is the decision below inconsistent with this Court's prior decisions and provisions of the FTC Act, but it is utterly devoid of precedential support. The court of appeals relied upon only two authorities (App. A, *infra*, 3a): its previous decision in *Patel* v. *INS*, 638 F.2d 1199 (9th Cir. 1980), and Professor Kenneth Culp Davis' treatise on administrative law (2 *Administrative Law Treatise* § 7:25, at 124 (1979)).

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[10] In 15 U.S.C. 45(m)(1)(A), Congress provided separately for civil penalty actions against those who violate rules respecting unfair or deceptive acts or practices, if they have actual knowledge or "knowledge fairly implied" that the practice is unfair or deceptive and is prohibited by rule. The rules that form the basis for such actions must be promulgated in accordance with Section 18 of the Act, 15 U.S.C. (& Supp. IV) 57a, which requires compliance with the rulemaking procedures in the Administrative Procedure Act, 5 U.S.C. (& Supp. IV) 553, as well as certain additional procedures.

Upon examination, however, it is clear that neither authority supports the court's decision.

In *Patel*, the Board of Immigration Appeals held that aliens were ineligible to remain in this country even though they had satisfied the express provisions of the so-called "investor exemption" contained in 8 C.F.R. 212.8(b)(4). The Board based its decision upon a previous adjudication that purported to add a requirement to that exemption (see 638 F.2d at 1202). Prior to the adjudication announcing the new requirement, the same requirement had been included in a proposed amendment to the rule but had been withdrawn after notice and comment *(ibid.)*.

The court of appeals held on two alternative grounds that the aliens were eligible for the "investor exemption." First, the court concluded that the new requirement should have been adopted by rulemaking rather than adjudication (638 F.2d at 1203-1205). Second, the court held that the Board abused its discretion in applying the new requirement in the case at hand because "INS had been sending aliens confusing signals" (*id.* at 1205).

Patel provides no support for the decision in this case. Only the first alternative ground for decision in *Patel* could conceivably support the decision below, and that ground was apparently abandoned in a subsequent decision by the same court (*Bahat* v. *Sureck*, 637 F.2d 1315 (9th Cir. 1981)). Moreover, *Patel* involved an adjudication that was seemingly inconsistent with the regulation then in effect and that adopted a rule that the agency had recently decided not to issue after notice and comment. The circumstances in the present case are not even faintly analogous.[11]

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[11] In addition, the first alternative holding in *Patel* was based primarily upon *Chenery II*, *Wyman-Gordon*, and *Bell Aerospace* (see 638 F.2d at 1203-1205). Thus, if *Patel* embraced the rule that an agency must proceed by rulemaking when announcing a new statutory interpretation of widespread application, it was based upon a patent misreading of those decisions (see pages 8-12, *supra*).

The only other authority cited by the court of appeals was Professor Davis' treatise, but Professor Davis has specifically disavowed the court's reliance upon his book (*1982 Supplement to Administrative Law Treatise* § 7.25, at 182-183).[12]

4. The rule announced in the court of appeals' decision—that "an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application"—is not only incorrect; it is unworkable. There is no bright line between adjudications that "change the law" and those that do not.[13] Similarly, there is no clear distinction between decisions with "widespread application" and those with a narrower reach. The court of appeals did not attempt to define the term "widespread application," and it is doubtful that a satisfactory definition could be developed. Any decision rendered in an adjudicatory proceeding may have precedential value, and the future significance of a decision is frequently

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[12] Professor Davis wrote (*1982 Supplement to Administrative Law Treatise, supra*, § 7.25, at 182-183):

> The Treatise strongly favors rulemaking over adjudication, but the court in the Ford opinion should not have imputed to it the view that "courts should require agencies to use rulemaking procedures when the agency adopts new law * * *." The page the court cited (§ 7.25 at 124) was on the subject of "a rule announced in an adjudicatory opinion, *not applied in the particular case*, changing a former rule," and the court ignored the words here italicized. The following page says that "the courts obviously should allow the Board to evolve labor law through adjudication * * *."

He added (*id.* at 181-182) that the court of appeals' holding was

> truly spectacular because (a) no previous law supports it, (b) both courts and agencies have at all stages of their development changed law through adjudication even when such law is of widespread application, and (c) the proposition is directly contrary to two prominent Supreme Court holdings [*i.e.*, *Chenery II* and *Bell Aerospace*].

[13] In this case, for example, the Commission simply applied existing U.C.C. precedent to a set of facts that had not been presented to any court in the identical form.

unclear until long after it is handed down. Accordingly, the rule announced by the court of appeals' decision would cast doubt upon the validity of a very large number of agency adjudications. It would provide a basis for challenging most adjudications and would spawn numerous petitions for review in which the courts would be called upon to decide whether a particular adjudication created "new law" and whether it had "widespread application."

5. While this Court has held that the choice between adjudication and rulemaking is committed to an agency's sound discretion, it has recognized that "there may be situations where the [agency's] reliance on adjudication would amount to an abuse of discretion" (*NLRB* v. *Bell Aerospace Co.*, *supra*, 416 U.S. at 294). In this case, however, the court of appeals did not find that the Commission abused its discretion but rather that it "exceeded its authority" (App. A, *infra*, 5a). Moreover, even assuming, despite the language of the decision, that the court of appeals found an abuse of the Commission's discretion rather than action in excess of statutory authority, the court's decision is nevertheless irreconcilable with the decisions of this Court discussed above.

The court of appeals gave great weight to its belief that the Commission's construction of the U.C.C. was unprecedented and to the lack of prior notice of the Commission's interpretation (App. A, *infra*, 4a). But *Chenery II*, *Wyman-Gordon*, and *Bell Aerospace* all involved adjudications interpreting the law in a new way, and in none of those cases was prior notice of the new interpretation given to the parties. Yet all of those decisions found no abuse of agency discretion. Indeed, in *Chenery II*, *supra*, 332 U.S. at 203, the Court expressly "refuse[d] to say that the Commission, which had not previously been confronted with the problem * * *, was forbidden from utilizing

[the adjudicatory] proceeding for announcing and applying a new standard of conduct."[14]

The court of appeals stated that the Commission's pending rulemaking proceeding concerning credit practices sought "to remedy, more or less, the same credit practices" involved in this case (App. A, *infra*, 4a). In fact, however, the proposed rule does not address the disposition of surpluses resulting from the sale of repossessed collateral, and the notice of it did not invite comment on that subject (see 40 Fed. Reg. 16347 (1975)). To be sure, the court of appeals correctly observed that the Commission "could have formulated its position on U.C.C. § 9-504" through rulemaking (App. A, *infra*, 4a). But the same was true in *Chenery II*, *Wyman-Gordon*, and *Bell Aerospace*. All those cases involved situations in which the

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[14] The misleading statements in the court of appeals' opinion led Professor Davis to suggest that the result in this case (although not the court's rationale) might be justified (*1982 Supplement to Administrative Law Treatise*, *supra*, § 7:25 at 183). He wrote (*ibid.*; emphasis in original) "[t]he support for the Ford decision lies in *the combination of* (a) the general superiority of rulemaking over adjudication for making new law, (b) the strong fact that the question whether to adopt the new law was simultaneously under consideration in a pending rulemaking proceeding, and (c) the palpable unfairness of singling out the one dealer for prosecution and denying intervention to the association representing 3,500 dealers." As noted, however, (see page 18 & note 15, *infra*) the proposed rule does not address the question involved in this case, and the association's request to intervene was granted in part with leave to renew the remainder of its application. Furthermore, Francis Ford was not unfairly singled out for special treatment. At present, the sole effect of the Commission's order upon Francis Ford is to require cessation of the practice adjudged unlawful. Under 15 U.S.C. 45(m)(1)(B), a similar obligation is imposed upon any other dealer with actual knowledge of the Commission's holding.

agency had a choice between rulemaking and adjudication (see 416 U.S. at 294; 394 U.S. at 765-766, 772; 332 U.S. at 203).[15]

Moreover, this case, like *Bell Aerospace*, "is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on [Commission] pronouncements. Nor are fines or damages involved here" (416 U.S. at 295). The Commission's holding did not reverse any prior agency precedents on which respondent might have relied, and the only consequence of the order under review is prospective: Francis Ford must cease withholding surpluses in the future, like the other parties named as respondents in the Commission's complaints.

While the Commission expressly warned that after judicial review it might seek consumer redress under Section 19(a)(2) of the Act, 15 U.S.C. 57b(a)(2), it did not decide that question (App. D, *infra*, 36a) and that issue was not before the court of appeals. Moreover, the standards of Section 19(a)(2) and (b), 15 U.S.C. 57b(a)(2) and (b), ensure that a retroactive remedy for consumer injury will not be imposed on Francis Ford unless

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[15] The court of appeals found it significant that the Commission "appended a 'Synopsis of Determination' to the order, apparently for the purpose of advising other automobile dealerships of the results of this adjudication" (App. A *infra*, 5a). But such synopses, which are issued to simplify notice under 15 U.S.C. 45m(1)(B), add no more to the Commission's opinion than do the syllabi accompanying this Court's decisions.

The court of appeals stated that the Commission denied the National Association of Car Dealers' request to intervene (App. A, *infra*, 2a). However, the Association was permitted to intervene on the issue of remedy, and the Commission stated that it would be "favorably disposed" toward a renewed application for intervention on the issue of liability if it appeared that the relevant issues would not be adequately presented by the parties (see App. D, *infra*, 35a n.16). No such renewed application was made and the Association chose not to appear at all in the administrative proceeding even as amicus curiae (*ibid.*).

the courts find that remedy to be equitable under the circumstances. Such redress may be awarded only if the Commission proves that a reasonable man would have known under the circumstances that the practices in question were fraudulent or dishonest. 15 U.S.C. 57b(a)(2).

Even if the Commission's determination in this case had immediate retroactive effects, those effects would not render its use of adjudication an abuse of discretion. Adverse consequences that substantially outweigh the public interest involved would have to be shown. See *Bell Aerospace Co.*, *supra*, 416 U.S. at 295. As *Chenery II* explained (332 U.S. at 203):

> Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

The conduct found unlawful by the Commission in this case—systematic retention by a creditor of surpluses earned on sale of a debtor's collateral, in violation of the U.C.C.—involves a serious departure from fair credit practice that outweighs any ill effects of retroactive application.

Finally, the court of appeals disregarded one of the Commission's principal reasons for choosing adjudication instead of rulemaking (App. D, *infra*, 31a-32a). Only adjudication would permit the Commission to accomplish the dual statutory objectives of (1) defining and promptly halting the unfair practice and (2) establishing the possibility of redress for consumers previously injured by the condemned practices (if the requisite showing can be made). The consumer redress for rule violations is available only after issuance of the rule. See page 3, *supra*. It cannot be an abuse of discretion for an agency to select adjudication rather than rulemaking when that choice is necessary for the agency to discharge its statutory mandate.

CONCLUSION

The petition for a writ of certiorari should be granted.[16]
Respectfully submitted.

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[16] The Court may wish to consider summary disposition.